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& GRANNIS LLP

July 23, 2019

**Ex Parte via ECFS**

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

*Re: Promoting Telehealth and Telemedicine in Rural America*, WC Docket No. 17-310

Dear Ms. Dortch:

On July 19, 2019, I, counsel to GCI Communication Corp. (“GCI”), spoke with Preston Wise, Special Counsel to the Chairman. In that conversation, I discussed points summarized in my ex parte letters of July 17, 2019 and July 18, 2019 and incorporated by reference herein.<sup>1</sup>

On July 22, 2019, Tina Pidgeon, Senior Vice President and General Counsel of GCI; Chris Nierman, Senior Counsel, Federal Affairs for GCI; Angela Giancarlo of Mayer Brown, outside counsel to GCI; and I met with Travis Litman, Chief of Staff to Commissioner Rosenworcel, and Randy Clarke, Acting Legal Advisor to Commissioner Starks. In those conversations, we expressed our support for the Draft Order’s competitive bidding and gift rule reforms. We also reiterated the three principal concerns with the Draft Order’s<sup>2</sup> rate provisions as summarized in my July 17, 2019 ex parte. To have an order that reasonably implements Section 254(h)(1)(A), the Commission should seek further comment on its rate proposals.

First, as discussed in my July 17, 2019 ex parte, the Draft Order inappropriately groups dissimilar areas together in the same rural tier areas that are not actually comparable, as required by Section 254(h)(1)(A). While the use of rural tiers is found in the Draft Order to be “a more precise means of determining rurality because it prevents rates in the most rural areas from being unfairly reduced by being combined with rates from less rural areas,”<sup>3</sup> the reverse is actually the case in light of over-broad groupings. While not unique to Alaska, several examples from

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<sup>1</sup> Letter from John T. Nakahata, Counsel to GCI Communication Corp., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-310 (filed July 17, 2019); Letter from John T. Nakahata, Counsel to GCI Communication Corp., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-310 (filed July 18, 2019).

<sup>2</sup> *Promoting Telehealth in Rural America*, Draft Report & Order, FCC-CIR1908-03, WC Docket No. 17-310 (Draft rel. July 11, 2019), <https://docs.fcc.gov/public/attachments/DOC-358434A1.pdf> (“Draft Order”).

<sup>3</sup> Draft Order ¶ 33.

Alaska demonstrate this point; they underscore that further consideration is necessary to develop a more appropriately granular categorization of geographic areas.

- It is simply implausible to claim that areas of the Aleutian Islands or western or northern Alaska that can be reached only by boat or airplane are “comparable” to areas along the Alaska highways or in southeast Alaska adjacent to the north/south undersea fiber to Seattle and Portland.
- Moreover, areas served only by satellite are not comparable with areas that have service from fiber or microwave. Areas served only by satellite and microwave are distinct from areas served by fiber, and even fiber-served areas can be distinct (compare, for example, the northwestern regional centers served by Quintillion with fiber served areas along Alaska’s highways). These areas are distinct because they have very different supporting infrastructures and very different structures to their service costs—one size does not fit all areas in a state within a given tier.<sup>4</sup>

Grouping together areas with dissimilar costs-to-serve would tend to channel support to lower cost areas within that grouping, which will, over time, deny services and service upgrades to healthcare providers in higher cost-to-serve areas.<sup>5</sup> Among other reasons why this would reasonably be expected to occur is that competitive bidding (both in the Telecom Program and more generally), would be expected to bid rates in lower cost areas down to cost, but the Draft Order caps rates in higher cost areas at the USAC-prescribed median. The Draft Order expressly embraces this result, specifying that the rural rate must be the lower of the contract (i.e. competitively bid) rate or the USAC-prescribed median.<sup>6</sup> This leads to underfunding the provision of services to the higher cost portions of the rurality zone. It will not carry out Congress’ objective of supporting telemedicine services to highly rural areas, and of ensuring that services to rural health clinics continue to advance as advances are made in urban areas. Accordingly, grouping all of these dissimilar areas together, as the proposed “Extremely Rural” tier would do in Alaska (and likely in other areas of the country as well),<sup>7</sup> is both a violation of Section 254(h)(1)(A) and arbitrary and capricious.

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<sup>4</sup> As an example, AT&T Business Pricing Guide for Ethernet WAN Alaska Service, at 7 (attached) differentiates services offered in different zones, Groups 2 and 3, with some Group 2 locations and all Group 3 locations falling within the Draft Order’s proposed “Extremely Rural” zone.

<sup>5</sup> See Comments of General Communication, Inc. at 40, WC Docket No. 17-310 (filed Feb. 2, 2018).

<sup>6</sup> Draft Order ¶ 61.

<sup>7</sup> Community Care of West Virginia notes, “It is difficult, if not impossible, for HCPs to determine what effect the proposed rules would have on them based on this map [in Figure 3 of the Draft Order].” They continue, “[W]e simply cannot identify which classifications our locations would receive.” Letter from Kristi Walker, Senior Project Manager, Community Care of West Virginia, to Chairman Pai and Commissioners, FCC, WC Docket No. 17-310, at 2 (filed July 19, 2019).

Second, the Draft Order's proposal for USAC to determine which services within the comparable geography are "similar" to those purchased by the rural healthcare provider faces a host of operational problems that the Draft Order does not consider or passes over too quickly:

- To start with, USAC's existing E-rate Open Data database, which the Draft Order contemplates as a significant source for its new database, lacks the information necessary for USAC to evaluate service comparability. For example, the Draft Order acknowledges that USAC must distinguish between best efforts and dedicated services,<sup>8</sup> but that information is not collected by USAC.
- USAC also does not collect information as to tiers of packet prioritization, latency, jitter, whether a circuit is protected (e.g. with redundancy), mean time to restoral, or other relevant service quality parameters. Without this information, USAC's database would mix low priority with high priority, high latency with low latency, unprotected with protected, etc. That would result in comparing rates for dissimilar, rather than similar services as specified by Section 254(h)(1)(A). The only way to assemble a database with this information, as well as distinguishing best efforts from dedicated, would be to conduct an entirely new data collection, even for E-rate services.
- The 30 percent bandwidth range is expansive for large bandwidth circuits, e.g., from 700 Mbps to 1.3 Gbps for a 1 Gbps circuit, but tiny for small circuits, e.g., from 3.5 Mbps to 6.5 Mbps for a 5 Mbps circuit. Is there really a reason to exclude a 1.5 or 10 Mbps when computing a rate for a 5 Mbps, at least if what is computed is a per Mbps rate?
- In specifying that the USAC should select a "median" rate, the Draft Order does not specify how that median is to be determined. For example, is it the median of all circuits at advertised within a specified bandwidth range, rural tier and quality parameter, such that if there were 9 circuits at \$100, one circuit at \$30, and one circuit at \$50, the median would be \$100 (50% at or below \$100 and 50% at or above \$100)? Or would it be the median of rates, irrespective of demand, i.e., in this example, \$50 (the median of \$30, \$50 and \$100)? Each has dramatically different results, as well as sensitivity to data errors.
- When determining the median rate within a 30% bandwidth range, would USAC determine the median in absolute total dollars, or the median on a per Mbps basis? If on a total price basis, why would it be rational to assume that the total price for a 700 Mbps circuit would be the same as the total price for a 1.3 Gbps service, which provides 85% more bandwidth? Yet that is the assumption if the median is based on total price. A rational approach would compute a median per Mbps rate that could then be applied to the circuit purchased by the healthcare provider.
- How do volume and term discounts affect the determination of "similar" services and the computation of a median price? If rates that result from volume and term

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<sup>8</sup> See Draft Order ¶ 17.

discounts are included in determining a rural rate for a healthcare provider that does not purchase the same volume or term, then the resulting median rates will not comply with Section 254(h)(1)(A). In addition, telecommunications carriers will be discouraged from offering volume and term discounts. That would be counterproductive, as it would tend to increase rural rates.

Because the Commission would need to undertake an entirely new data collection, the Draft Order likely cannot be implemented in time for healthcare providers to develop and issue RFPs in time for the FY2021 procurement cycle. The Commission would have to design a new data collection, OMB would have to approve the data collection, and USAC would then have to collect the data, build and publish its database, and determine and publish its median rates. We also noted that the Commission does not have the authority to delegate its quasi-legislative ratemaking function to USAC—or even to the Wireline Competition Bureau. Section 205 of the Communications Act reserves that authority to the Commission.

Third, as discussed in my ex parte of July 17, 2019, GCI's experience has shown that the E-rate Open Data database is plagued with data that render it unreliable even as to the data it does contain. In order for any system using the E-rate database to set maximum rural rates to work, the underlying data would have to be subject to audit and correction. Otherwise, the computation of a median rate will simply be "garbage in, garbage out." The Commission cannot, consistent with reasoned decision-making, ignore these fundamental data quality issues.

All of this suggests that the rate provisions of the Draft Order would benefit from further comment in an FNPRM, rather than proceeding to Order now. To facilitate stakeholder review, the Bureau should also release the map in Figure 3 at a level of detail similar to its Study Area Boundary Map, including state boundaries and locations of communities.

Finally, we noted that GCI had proposed a much simpler, less regulatory, and market-friendly approach to reform of the Telecommunications Program's rate mechanisms—which could be implemented in time for the FY2021 procurement cycle. Rather than the Draft Order's ex ante rate regulation, GCI proposed that the Commission gradually phase-in a minimum copayment for healthcare providers, starting at one percent and increasing up to five percent, with rural rates determined through competitive bidding.<sup>9</sup> These changes would operate in conjunction with the reforms to the competitive bidding process already set forth in the Draft Order. This would be an economically rational structure, harnessing the market to discipline healthcare provider procurement decisions and maintaining consistency with the Commission's deregulation of interexchange and most BDS services.<sup>10</sup> It would also be simpler, which would encourage greater participation by telecommunications carriers and rural healthcare providers,

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<sup>9</sup> Additional Comments of GCI Communication Corp. at 32, WC Docket No. 17-310 (filed Jan. 30, 2019); Additional Reply Comments of GCI Communication Corp. at 9–10, WC Docket No. 17-310 (filed Feb. 13, 2019).

<sup>10</sup> Of course, where BDS services remain regulated, that regulation, rather than an overlay for services to rural healthcare providers only, would govern.

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and would be more predictable for all participants. All of these public interest benefits would justify the limited forbearance necessary to implement this approach, which relies on rates that the Commission has already generally found to be just and reasonable. While the Draft Order acknowledges GCI's proposal, an opportunity for actual consideration of it is required to meet the requirement for reasoned decision-making.<sup>11</sup>

Please let me know if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "John T. Nakahata".

John T. Nakahata

*Counsel to GCI Communication Corp.*

Attach.

cc: Preston Wise  
Travis Litman  
Randy Clarke  
Arielle Roth  
Joseph Calascione  
Trent Harkrader

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<sup>11</sup> See Draft Order ¶ 63.